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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 694

E. H. ALBRECHT, *et al.*,
Petitioners,

vs.

INDIANA HARBOR BELT RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 178 F. 2nd at page 577.

JURISDICTION.

Petitioners seek to invoke jurisdiction under Section 1254 of the Judicial Code.

STATEMENT OF THE CASE.

Petitioners, for and on behalf of themselves and those similarly situated, filed this action in the District Court, for the Northern District of Indiana, Hammond Division,

on August 4, 1947, invoking jurisdiction on the ground of diversity of citizenship (R. 1). By their complaint, and upon two counts, they seek damages for breach of a contract between Respondent and the Brotherhood of Railroad Trainmen, an unincorporated labor organization. Under the theory of the first count, damages are claimed of Respondent for failing to provide work which the Petitioners were ready and willing to do. Under the second count, Petitioners allege that Respondent, in violation of its contract, required Petitioners to perform two different types of work, on the days which they did work, while paying them for only one full day's work for each working day.

Petitioners admittedly are not parties to the contract, but sue as beneficiaries thereof. The contract was executed in Chicago, Illinois, on December 20, 1919. It governs wages, hours, and working conditions of yardmen working in Illinois. The alleged violations occurred in Illinois over a period of from August 13, 1926, to and including December 12, 1938. It thus appears on the face of the complaint that the contract is to be interpreted under Illinois law. It affirmatively appears also that the last day of violation occurred approximately nine years and eight months prior to the filing of this suit (R. 1 through 10, inclusive).

The District Court, in dismissing the complaint on Respondent's motion, rendered a memorandum opinion (R. 11 through 14, inclusive). The judgment of the District Court was affirmed on December 20, 1949, by the Circuit Court of Appeals for the Seventh Circuit, with an opinion by Circuit Judge Duffy (R. 26-28).

Both the District Court and the Circuit Court of Appeals properly held that the laws of Illinois govern the legal interpretation of the contract sued upon, and that under Illinois law the contract is in legal effect an oral contract because parol evidence would have to be introduced to identify the parties and maintain the action. Since more

than six years had elapsed between the date of the last alleged breach and the commencement of the action, it affirmatively appears that the complaint does not state a claim upon which relief can be granted because of the Indiana statute of limitations governing actions for breach of contracts not in writing.

SUMMARY OF ARGUMENT.

I.

The first question presented is a procedural one, *i. e.*, whether or not the Statute of Limitations can be raised by way of motion to dismiss under the Rules of Civil Procedure. The complaint shows upon its face that it was filed approximately nine years and eight months after the last alleged violation. The law of the forum (Indiana) provides that actions upon contracts not in writing shall be commenced within six years after the cause of action accrued. The bar, therefore, clearly appears on the face of the pleading, and the complaint fails to state a claim upon which relief can be granted.

II.

The present suit is a common law action for breach of contract. The contract sued upon is partly in writing and partly oral. Since it was executed in Illinois, performed in Illinois, and the alleged breaches occurred in Illinois, the laws of Illinois govern its interpretation. Under the law of Illinois, a contract partly in writing and partly oral is in legal effect an oral contract. Since the Federal Courts apply the Statute of Limitations, as interpreted by the highest courts of the state where the action is brought, the action is barred by the Indiana 6-year Statute of Limitations.

ARGUMENT.

At the outset, Respondent calls attention to the fact that the questions herein sought to be reviewed were decided by the Circuit Court of Appeals not only in the present case, but in the case of *Kordewick, et al.* v. *Indiana Harbor Belt R. Co.*, C. C. A. 7th Cir. (1946), 157 F. 2nd 753. The same contract and the same alleged breaches are involved in this case that were involved in the *Kordewick* case. While the named plaintiffs in the *Kordewick* case are different they are members of the same union, that is, the Brotherhood of Railroad Trainmen, and are plaintiffs in this suit in the sense that they are members of the class which Petitioners purport to represent. They would participate, under the theory of the complaint, in the proceeds of any judgment rendered (see complaint, rhetorical paragraphs 9, 10, 11, and 12, R. 3 & 4). This Honorable Court denied certiorari in the *Kordewick* case on January 13, 1947. *W. G. Kordewick, etc., Petitioners* v. *Indiana Harbor Belt R. Co.* (1947), 329 U. S. 806, 67 S. Ct. 502.

I.

Petitioners make no mention of the procedural question in their petition. Consequently, it has been waived. Under the argument portion of the supporting brief, it is asserted that the time during which eleven of the Petitioners were members of the armed services should be deducted in applying the Statute of Limitations (Petitioners' Brief, page 11). There is nothing in the record to support such a statement, if it be a fact. In addition, no authorities are offered in support of Petitioners' legal contention.

Rule 12(b)(6) of the Rules of Civil Procedure provides

that a complaint may be attacked by motion for "failure to state a claim upon which relief can be granted". Rule 9(f) provides: "For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter." Petitioners, having pleaded the time of the breach (August 13, 1926, to and including December 12, 1938) like all other averments of material matter, have failed to state a claim upon which relief can be granted because they have failed to present their claim within the six years during which the law affords a remedy. It affirmatively appears that the claim, if any, is outlawed. Therefore, no relief can be granted.*

II.

Petitioners' action is a common law action for breach of a contract known as "Chicago Memorandum Agreement" executed in Chicago, Illinois, on December 20, 1919, between the Brotherhood of Railroad Trainmen and the Gen-

* The propriety of raising the Statute of Limitations by motion to dismiss has been approved in the following cases:

Anderson v. *Linton,* C. C. A. 7th Cir. (1949) 178 F. 2d 304.

Kordewick v. *Indiana Harbor Belt R. Co.,* C. C. A. 7th Cir. (1946), 157 F. 2d 753.

Gossard v. *Gossard,* C. C. A. 10th Cir. (1945), 149 F. 2d 111, 113.

Berry v. *Chrysler Corporation,* C. C. A. 6th Cir. (1945), 150 F. 2d 1002, 1003.

A. G. Reeves Construction Co. v. *Weiss,* C. C. A. 6th Cir. (1941), 119 F. 2d 472.

Abram v. *San Joaquin Cotton Oil Co.,* U. S. D. C. S. D. Cal. (1942), 46 F. Supp. 969.

Hartford-Empire Co. v. *Glenshaw Glass Co.,* U. S. D. C. W. D. Pa. (1942), 47 F. Supp. 711.

Barnhart v. *Western Maryland Ry. Co.* U. S. D. C. D. Md. (1941), 41 F. Supp. 980.

Gerard v. *Mercer,* D. C. D. Mon. (1945), 62 F. Supp. 28.

Wright v. *Bankers Service Corp.,* D. C. S. D. Cal. (1941), 39 F. Supp. 980.

eral Managers Committee (R. 6, page 7). The breaches allegedly occurred at the Blue Island, Illinois, yard over a period of from August 13, 1926 to December 12, 1938. Petitioners are not parties to the contract. Parol evidence would be necessary to show a contractual relationship between Petitioners and Respondent, that they (Petitioners) are or were employed by Respondent, that they were or are members of the union, that they were employed in the type of work covered by the agreement, and that they worked within the Chicago Switching District covered by the agreement (R. 2-9, inclusive).

Petitioners apparently admit that the contract is to be interpreted according to the law of the State of Illinois (Petition, page 4, and supporting brief, pages 13 and 14) but contend that the Circuit Court of Appeals refused or failed to interpret the Illinois law correctly. The question then resolves itself merely into an investigation as to what the applicable decisions of the Illinois Appellate and Illinois Supreme Courts are.

The court below, having already passed on the identical contract in the *Kordewick* case, *supra*, determined that under Illinois law the contract is, in legal effect, an oral contract because parol evidence would have to be introduced to identify the parties and maintain the action. In the *Kordewick* case the Circuit Court of Appeals cited and followed four Illinois decisions: *The Railway Passenger and Conductors' Benefit Ass'n.* v. *Loomis*, 142 Ill. 560; *Mowatt* v. *City of Chicago*, 292 Ill. 578; *Novosk* v. *Reznick*, 323 Ill. App. 544; and *Orminski* v. *Hyland Electrical Supply Co.*, 326 Ill. App. 392.

The Railway Passenger and Freight Conductors' Mutual Aid and Benefit Association v. *Loomis*, 142 Ill. 560 (1892), is a leading case in Illinois on the question here involved, and has been cited and followed many times by Illinois

courts.* That was an action by plaintiff to recover benefits claimed to be due by reason of the death of her husband. The only question considered by the court was whether the action was barred by the five year limitation statute. The court pointed out that if there were a written contract it would consist of the certificate of membership of plaintiff's deceased husband and the constitution and by-laws of defendant. The certificate certified that H. H. Loomis was a member of the association. It did not mention his wife, the plaintiff, nor did the constitution and by-laws refer to her in any way. In holding that the action was barred by the five year statute the court said:

> "It is clear, therefore that parol testimony must be resorted to, in order to connect the plaintiff with the contract as a party thereto. It must be shown by parol evidence, that Loomis did not leave a will, and that he did leave a widow, and that plaintiff is his widow.
>
> A contract cannot be said to be in writing, unless the parties thereto, as well as the terms and provisions thereof, can be ascertained from the instrument itself. If the party to a written contract is not named therein, the contract is defective as containing only a part of the agreement. In such case, the agreement is only partly reduced to writing, because parol proof must be resorted to, in order to show with whom the bargain was made" (p. 567). * * *
>
> But the constitution and by-laws merely designate in a general way certain classes of persons, who will

* Among such cases are *Conductors' Benefit Assoc.* v. *Tucker*, 157 Ill. 194, 205; *Gronowski* v. *Jozefowicz*, 291 Ill. 266, 277; *Mowatt* v. *City of Chicago*, 292 Ill. 578, 582; *Murphy* v. *Cicero Lumber Company*, 97 Ill. App. 510, 516; *Rittenhouse & Embree Co.* v. *Barry*, 98 Ill. App. 548, 554; *Speich* v. *A. T. & Santa Fe Ry. Co.*, 178 Ill. App. 266, 272; *Jacksonville Hotel Bldg. Corp.* v. *Dunlap Hotel Co.*, 264 Ill. App. 279, 323; *Ellithorpe* v. *Holmes*, 305 Ill. App. 625; *Richey* v. *Northwestern University*, 323 Ill. App. 293; *Novosk* v. *Reznick*, 323 Ill. App. 544, 551.

> be entitled to the benefit fund upon the death of a member; and parol evidence must be introduced to show that the plaintiff belongs to one of the designated classes. It must be proven by parol, not that the plaintiff is the particular person named in a certain writing, but that she possesses the qualifications which, under the constitution and by-laws, all persons must possess, who are entitled to receive the benefit fund. Hence, the written contract here sought to be set up is defective in necessitating the introduction of parol testimony in order to make it complete'' (pp. 568-569).

Plaintiff in the above case was barred by the five year statute because, not being named in the written instrument, she had to show by parol that she possessed the qualifications to entitle her to the benefit of the contract. Petitioners in the case at bar must also do that. They would have to show by parol that they possess the qualifications to entitle them to any benefits of the agreement upon which they rely. They would have to show by parol the existence of any contractual relationship whatsoever between them and respondent.

In *Mowatt* v. *City of Chicago,* 292 Ill. 578, the court held that, conceding the action to be based on the ordinance in question, the contract was an oral one, as to the Statute of Limitations, because parol evidence was necessary to show that there could be a recovery under the ordinance, saying:

> ''This court has held that a written contract is one in which all of its terms are in writing; that a contract partly in writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action the contract is not in writing under this statute'' (p. 582).

In that case the oral testimony necessary was to show that the ordinance in question had been accepted by plaintiff; that the money had been paid to the City as provided

therein, and that the five year statute of limitations had run against claims for damages against the City as to persons claiming injury from the vacation of the alley.

Novosk v. *Reznick,* 323 Ill. App. 544, 551 (1944), is another case indistinguishable in principle from the case at bar. In that case plaintiffs, as operators of defendants' motor buses sued for the difference between what they received from the defendants and the amount which the defendants contracted in writing with the Works Progress Administration to pay operators. At the trial it was stipulated that plaintiff, Novosk, worked for the defendant, from June 22, 1936, to July 10, 1937, as a bus driver engaged in carrying WPA workers to WPA projects. Novosks' suit was not filed within five years after July 10, 1937. After a review of the Illinois decisions on the question the court held that Novosk's action was barred by section 15 (five year) of the limitations act saying:

> "We are therefore impelled to hold that as parol testimony must be resorted to, to show the existence of a contractual relationship between the plaintiffs and the defendants, plaintiff Novosk's action was barred by the 5-year statute of limitations, not having been commenced within five years from July 10, 1937."

In *Orminski* v. *Hyland Electrical Supply Co.,* 326 Ill. App. 392, 398 (1945), plaintiff brought an action for overtime wages as a truck driver at the hourly rates prescribed for such overtime in written contracts between defendant and plaintiff's labor union. Plaintiff alleged that during the time involved he was a member of the union and was employed as a truck driver by defendant. With reference to the application of the five year statute of limitations the Illinois Appellate Court said the following:

> "After the order of dismissal was entered plaintiff made a motion for a ruling on that part of defendant's motion which sought to strike from the complaint all

claims for overtime not accruing within the five years from the commencement of the action. The court on hearing sustained defendant's motion and held upon the record then before it that plaintiff's action was covered by the five year statute of limitations governing oral contracts, because it would be necessary to resort to parol evidence to show that plaintiff was a member of his union and therefore entitled to the benefits of the contract between defendant and the union. This ruling is correct. *Novosk* v. *Reznick,* 323 Ill. App. 544, 549-551."

Petitioners attempt (p. 13) to distinguish the case of *Novosk* v. *Reznick, supra,* on the ground that the plaintiff, a truck driver, "had no duly constituted, elected representative enter into any negotiated contract for and on his behalf." This is a distinction without a difference. Novosk was a third party beneficiary just as Petitioners are third party beneficiaries in the instant case. Whether the WPA made a contract for the benefit of Novosk, as an elected representative of Novosk, or not would not affect the legal principle involved. Likewise, Petitioners cannot successfully distinguish the case of *Conductors' Benefit Ass'n.* v. *Loomis, supra.* Petitioners are not named or designated as beneficiaries in the contract involved in these proceedings (R. 6 through 10, inclusive) any more than the plaintiff was in the *Loomis* case. Nor are there any promises made in favor of Petitioners.

The six cases referred to on page 12 of Petitioners' brief: *Order of Conductors* v. *Pitney,* 326 U. S. 561; *H. J. Heinz Co.* v. *NLRB,* 311 U. S. 514; *Cleapor* v. *Atlantic, B. and C. R. Co.,* 123 F. 2nd 374; *Howard* v. *C. B. & Q. Ry.,* 146 F. 2nd 316; *Union Pacific R. Co.* v. *Olive,* 156 F. 2nd 737; and *Sanders* v. *L. & N. Ry. Co.,* 144 F. 2nd 485, are from jurisdictions other than Illinois and do not have any bearing upon the question herein presented.

With regard to the three Illinois cases referred to, *Emma Jones, et al.* v. *Supreme Lodge Knights of Honor*, (1908) 236 Ill. 113, is readily distinguishable on the facts. The constitution and by-laws of the defendant organization contained the express written provision that the heirs were entitled to the death benefits of the deceased certificate holder in the event he was not survived by a widow or children. The court, at page 117, said that its decision was in complete harmony with *The Railway Passenger and Freight Conductors' Mutual Benefit Ass'n.* v. *Loomis*, (1892) 142 Ill. 560. In *Electrical Contractors' Association of the City of Chicago* v. *A. S. Schulman Electric Co.*, 391 Ill. 333, all of the provisions of the contract were in writing. The court stated at page 345:

> "The agreement which controls is defendant's request to plaintiff, on February 25th, 1926, to have the name of A. S. Schulman on its records changed to read A. S. Schulman Electric Co., and plaintiff's constitution and by-laws. These are all written, and nothing further is needed to establish the contract."

Economy Fuse & Mfg. Co. v. *Raymond Concrete Pile Co.*, (1940) 111 F. 2nd 875, involved a written contract between the parties to the suit. This case was distinguished by the Circuit Court of Appeals in its decision in the *Kordewick* case.

Petitioners in the instant case have attempted to avoid the adjudication in the *Kordewick* case by re-filing in Indiana. The applicable statute is Burns' Indiana Statutes, 1933, Section 2-601 which provides as follows:

> "The following actions shall be commenced within six (6) years after the cause of action was accrued, and not afterward:
>
> First. On accounts and *contracts not in writing.*" (Italics ours.)

The law of the forum determines whether the action is barred by the Statute of Limitations, and the Federal Courts apply the Statutes of Limitation as interpreted by the highest courts of the state where the action is brought (*Moore* v. *Illinois Cent. R. Co.* (1941) 312 U. S. 630; 615 S. Ct. 754; *Erie Railroad Co.* v. *Tomkins,* (1938) 304 U. S. 64; 58 S. Ct. 817). Under Illinois law, the contract involved is oral. The action, having been commenced nine years and eight months after the last alleged violation, is outlawed.

Conclusion.

This court, except in extraordinary cases, will not review the considered determination of questions of state law by the intermediate federal appellate courts. *Huddleston* v. *Dwyer,* 322 U. S. 232, 237. As recently as April 10, 1950, this court has questioned the policy of the federal courts taking jurisdiction of claims similar to those made by Petitioners. *Slocum* v. *D., L. & W. R. Co.,* ..... U. S. ....., and *Order of Railroad Conductors* v. *Southern Railway Company,* ..... U. S. .....

Despite the contentions made by Petitioners, there is nothing unusual about the decision of the court below. The Circuit Court of Appeals does not ignore the Railway Labor Act or contracts entered into pursuant to its terms.

The decision has nothing to do with collective bargaining rights. Petitioners, like any other plaintiffs seeking damages for breach of an oral contract, must commence their action, if any, within the statutory period provided for by law.

We respectfully urge that the decision of the Circuit Court of Appeals is correct, and that the petition be denied.

Respectfully submitted,

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